Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-223

JOHN WESLEY HASTY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

JOHN WESLEY HASTY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 19, 1974 and denial of Motion for Rehearing entered on August 2, 1974.

OPINIONS BELOW

The opinion of the trial court below has not been reported.

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 19, 1974 and is here set out in it's entirety:

PER CURIAM:

AFFIRMED. See Local Rule 21(1). The probable cause and exigent circumstances basis for the arrest of Appellant without a warrant was ample. The evidence which Appellant moved to supress was seized incident to the arrest. The district court did not err in denying the motion to supress.

The United States Court of Appeals for the Fifth Circuit Local Rule 21 (1) provides for affirmance without opinion when the Court determines "that a judgment of the district court is based upon findings which are not clearly erroneous." A motion for rehearing was denied on August 2, 1974.

JURISDICTION

Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 19, 1974. Jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254 (1), providing for the granting of a writ of certiorari upon the petition of any party after rendition of judgment.

An order extending the time to file a motion for rehearing to and including July 17, 1974 was granted by the Court of Appeals. An order denying the motion for rehearing was entered on August 2, 1974.

QUESTONS PRESENTED

1. Whether Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were violated by the admission of evidence seized incident to his warrantless arrest which was without reasonable grounds or sufficient probable cause.

2. Whether Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were violated by the admission of evidence seized through a warrantless search of Petitioner's entire hotel room beyond the area of his reach, the removal of all of his belongings and the later return to him of items not desired to be used as evidence against him.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S.C. Const. Amendment IV:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

49 U.S.C. sec. 1401 (f):

> Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

STATEMENT OF THE CASE

Petitioner was indicted on three counts:

1) Conspiracy to import and possess with intent to distribute 970 pounds of marijuana. 2) aiding and abeting the importation of marijuana, and 3) aiding and abeting the possession of marijuana with intent to distribute.

Petitioner was convicted by jury on all three counts and received the maximum sentence on each count to run consecutively for a total of fifteen years confinement, thirty year special parole term and a fine of $45,000.00.

Appeal was perfected to the United States Court of Appeals for the Fifth Circuit which affirmed the case per curiam.

The Petitioner contends that his warrantless arrest was illegal and without probable cause because the basic reason he was arrested is that a check of the registration of an aircraft alleged to have carried contraband showed registration in the Petitioner's name. Use of this to establish ownership in the Petitioner violated 49 U.S.C. sec. 1401 (f). In fact the agents had information that an "unknown male" was with the Ap-

pellant and they had determined to also arrest him without further probable cause. (App. 96-97).

Petitioner also complains that the warrantless search was illegal in that the agents exceeded the proper scope of search (App. 105). All of Petitioner's belongings were seized from his room, transported to customs offices and siited through at the leisure of the arresting agents (App. 238-39). None of the evidence thereby obtained tended to incriminate the Petitioner without the explanation of the unindicted co-conspirators and could not have been considered as incriminating at the time of the arrest since no alleged co-conspirator had yet related information to agents (App. 75, 79). There was no contraband nor any illegal items found in his room (App. 46, 105). A motion to supress was filed and denied in the trial court. (App. 28, 57).

The bulk of the Government's exhibits in the trial of this case consisted of papers and documents belonging to the Petitioner and removed from his belongings at customs headquarters (App. 238). After the agents had removed all of the Appellant's papers they desired to use as exhibits, they returned the remainder of his belongings to the Appellant at the property room at the jail. (App. 239).

The trial court held that consent for the search had been given by the Appellant's son. (App. 56). However it was shown that he was under arrest and was searched to find the key to his father's (the Appellant) room. (App. 98). There was no determination as to

his rights with respect to the room. (App. 99). The son was in handcuffs and obeyed the commands of the agents. (App. 99). The agents did not knock and entered the room by surprise. (App. 100).

The consent basis for the search was evidently rejected by the appeals court in their decision. They found the search to be valid "incident to arrest" of the Appellant. Consent should not be a basis for legality of this search since the officers knew that the Appellant was present in his room and could have knocked and asked his permission to search. The room was registered and in the Appellant's name (App. 108), which the agents could easily have determined before the search. They inquired at the desk and found that the Appellant was present in his room and had just received a phone call (App. 99). An illegal search cannot be justified by surprising someone sought to be arrested in his room and then searching all in his vicinity to obtain the evidence with which the case against him is perfected. Here, in fact, the entire room is sought to be justified as one agent admits searching the entire room including the bathroom (App. 105).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it abandons the basic Constitutional protections against unreasonable searches and arrests afforded by the Fourth Amendment. It abandons the basic tenants of due process and cracks open the door to unlimited federal police power.

Even where it is discovered from illegally seized materials that a crime has been committed, it is still the underlying policy that dictates that such evidence should be suppressed. Mr. Justice Brennan states:

> "We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to achieve that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." *Miller v. U.S.*, 357 U S. 301, 313, 2 L.Ed.2d 1332, 1340, 78 S.Ct. 1190, 1197-98 (1958).

1. *Wong Sun v. U.S.*, 371 U.S. 471, 479, 9 L.Ed.2d 441, 450, 83 S.Ct. 407 (1963), states that an arrest with or without a warrant must stand on firmer ground than mere suspicion and cites to *Henry v. U.S.*, 361 U.S. 98, 4. L.Ed.2d 134, 80 S.Ct. 168 (1959). Reasonable grounds for an arrest have been equated with the "probable cause" doctrine and the test of the grounds for an arrest would be that the facts and circumstances known to the officer at the time of the arrest must be sufficient in themselves to warrant a man of reasonable caution in believing that the arrested person has committed an offense. *U.S. v. Solis*, 469 F.2d 1113,

1115 (5th Cir. 1972); *Wong Sun v. U.S.*, supra at U.S. 479, L.Ed. 450; *Carroll v. U.S.*, 267 U.S. 132, 162, 69 L.Ed. 543, 555, 45 S.Ct. 280 (1925).

In *Henry v. U.S.*, supra, the arrest was found to be based upon insufficient grounds under the circumstances that F.B.I. agents investigating theft from an interstate shipment had information of an undisclosed nature from the defendant's employer implicating the defendant with interstate shipments. The agents observed the defendant place some cartons in his car. After the car was stopped the defendant was heard to say "Its the G's", followed by a request to a passenger to tell the agents he had picked the defendant up. The agents searched the car and seized cartons of stolen items. The court found that the agents did not have sufficient probable cause at the time the arrest was made even though the arrest was made while the defendant was in an automobile which relaxed the stringency of the rules somewhat. *Henry v. U.S.*, supra at U.S. 104, L.Ed.2d 140.

In the present case the Appellant was not arrested in an automobile but in the privacy of his temporary residence. (App. 67). Thus all the rules of probable cause should be applied with full force.

Apparently the major basis which induced the agent to arrest the Appellant in this case was that a check of the registration of the aircraft which allegedly flew the contraband into this country. In the direct examination of the agent he stated that he found that the plane, a Cessna 206, belonged to the Appellant through

a check of the plane's registration. (App. 61). The agent did not check to see if the Appellant had sold this airplane. (App. 73). However the agent relied upon the registration as proof of ownership of the airplane. (App. 74). The pilot of the plane did not name the Appellant as the owner. (App. 75, 79). The registration of an aircraft is, however, *no evidence* of ownership. There is no such instrument as a "certificate of title" to an airplane. *Pacific Financial Corp. v. Central Bank and Trust Co.*, 296 F.2d 68, 70-71 (5th Cir. 1961). Title 49 United States Code sec. 1401 (f) states "Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue." Thus the information of the registration of the aircraft *did not* indicate ownership and in fact under 49 U.S.C. sec. 1401 (f), should not have been used as evidence of ownership.

The record indicates that Mr. R. Downing, a witness from Gen Aero, testified that he informed the agents before they affected the arrest of the Appellant that the Appellant no longer owned the aircraft in question. (App. 197). He also indicated that it is the buyer who has the responsibility to change the registration when an aircraft is sold. (App. 202). This was strong evidence since this witness was an expert in the field of aircraft transfers (App. 194-196), and would have very little motivation to falsify his testimony.

Thus under 49 U.S.C. sec. 1401 (f) the evidence of ownership should not have been admitted. Without this, the agents provided very little reliable information

upon which to base probable cause for the arrest of the Appellant.

2. *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969) provides an exception to the warrant requirement to search when incident to a valid arrest. The basis for this exception is that when an arrest is made it is reasonable for the police to expect the arrestee to use any weapons he may have and attempt to destroy any incriminating evidence then in his possession. *Cupp v. Murphy*, 412 U.S. 291, 295, 36 L.Ed.2d 900, 905, 93 S.Ct. 2000 (1973).

An older case, *U.S. v. Rabinowitz*, 339 U.S. 56, 94 L.Ed. 653, 70 S.Ct. 430 (1950), involved upholding a search of a one room office in which the Defendant was arrested somewhat similarly to the present case. In overruling the doctrine of *Rabinowitz*, the court in *Chimel*, supra, said "The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand and more extensive searches on the other. *Cupp v. Murphy*, supra at U.S. 295, L.Ed. 906.

In this case the agents surprised the Appellant by opening the door to his hotel room residence unannounced and now claim that it was legal to search items around the vicinity of where they happened to find him standing. In fact the entire room was searched on this basis (App. 105). It was disclosed by agent Overstreet that *all* of the Appellant's belongings were taken into custody at the time of his arrest and according to "procedure" all was searched and the items which

were not considered as "evidence" were returned to the Appellant at the jail. (App. 238-239).

In this case there was an arrest without a warrant and then not only a search of the entire room in which the Appellant was staying, but of hauling all of Appellant's belongings for examination without a warrant ever having been issued. Certainly a warrant could have been obtained. An assistant United States attorney was contacted some eight hours before the Appellant was arrested. (App. 86, 92).

The search might have been stronger had a warrant been obtained for the Appellant's arrest. Surely, however, no urgency prevailed after the Appellant's arrest. A warrant to search the premises could then have easily been obtained at the leisure of the agents. This case seems parallel to the *Rabinowitz* case, supra, which was overruled.

To walk into a man's room without a warrant and to arrest him upon shaky grounds to say the least, and then to seize every iota of his belongings and to take them in for inspection for possible evidence extends so far beyond the Constitutionally protected concepts of due process and probable cause as to shock the conscience.

U.S. v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926), records the appropriate wisdom of Judge Learned Hand: "It is small consolation to know that one's papers are safe only so long as one is not at home."

Certainly this case exhibits a compelling need tc review the decision below in order to limit searches such as this in the future.

CONCLUSION

For the reasons set out above it is respectfully submitted that this writ of certiorari should be granted.

C. LOGAN DIETZ

RAEBURN NORRIS

CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served upon Joel D. Conant, Assistant U.S. Attorney, Western District of Texas, Box 1701, San Antonio, Tex. 78296 by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of August 1974.

RAEBURN NORRIS

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1121
SUMMARY CALENDAR*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOHN WESLEY HASTY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(June 19, 1974)

Before BELL, SIMPSON, and MORGAN, Circuit Judges.

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 5 Cir., 1970, 431 F.2d 409.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1] The probable cause and exigent circumstances basis for the arrest of appellant without a warrant was ample. The evidence which appellant moved to suppress was seized incident to the arrest. The district court did not err in denying the motion to suppress.

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[1]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1121

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOHN WESLEY HASTY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(August 2, 1974)

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-223

JOHN WESLEY HASTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was arrested without probable cause and that the agents exceeded the permissible scope of a search incident to arrest.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy to import and possess marihuana with intent to distribute (Count One), and having aided and abetted the commission of those offenses (Counts Two and Three), in violation of 21 U.S.C. 841(a)(1) and 952(a) and 18 U.S.C. 2. He was fined $45,000 and sentenced to a term of fifteen years' imprisonment and thirty years of special parole. The court of appeals affirmed *per curiam* (Pet. App. 1a-2a).

On June 30, 1973, at approximately 1:00 a.m., two men were arrested in Hondo, Texas in a pick-up truck loaded with 970 pounds of marihuana (H. 2-3).[1] The owner of the truck, Walter Denny Turner, was arrested several hours later by Agent Wilson of the United States Bureau of Customs. Turner admitted that he had flown the marihuana into the United States and told Agent Wilson the location of the plane, a Cessna 206. Agents Wilson and Overstreet then went to Uvalde, Texas, and inspected the aircraft (H. 3-4, 22). Turner also disclosed to Wilson that the plane was owned by his employer, a wealthy rancher in Mexico (H. 4, 18, 22, 30).

Agent Wilson had learned that petitioner was a rancher in Mexico, and was the registered owner of the Cessna 206 (H. 5-7, 32-33).[2] Wilson was aware that another plane owned by petitioner had recently been examined by Customs agents on two occasions and was found to contain marihuana sweepings (H. 6). Moreover, Wilson knew that yet another plane owned by petitioner and loaded with marihuana had previously crashed in Mexico (H. 6). An examination of the files of the Bureau of Customs had also indicated that petitioner was a susupected narcotics smuggler (H. 7). Upon being advised that petitioner and another male had recently arrived at San Antonio International Airport, Agent Wilson decided to arrest them (H. 36-39).

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[1]"H." refers to the volume of the transcript of the hearing on the motion to suppress. "Tr." refers to the transcript of the trial.

[2]Petitioner contends that the Cessna 206 had been sold prior to his arrest. Richard Downing, an aircraft salesman for the company through which petitioner purchased planes, told Agent Overstreet prior to petitioner's arrest that petitioner no longer owned the Cessna 206 which he had purchased on May 16, 1973 (Tr. 307, 324). Nevertheless, petitioner was listed as the registered owner of the aircraft both at that time and in November 1973, one month prior to trial (Tr. 375-376). Investigations by Agent Overstreet failed to reveal any other owner (Tr. 376-380). Petitioner produced no evidence as to the identity of the alleged buyer of the plane.

Agent Wilson arrived at the airport and arrested Johnny Mack Hasty, petitioner's son, who informed him that his father was at the Albert Pick Motel, Room 230 (H. 9, 40). Wilson sought authorization from petitioner's son to search the room. Johnny Hasty gave Wilson the room key, which had been discovered in a search of his person, and told Wilson that he could search the room for there was nothing there (H. 9, 41).[3]

Wilson had been informed that petitioner carried a gun in his briefcase and should be considered dangerous (H. 7, 42, 44). After checking at the registration desk to determine whether petitioner was in his room, Agent Wilson, accompanied by other agents, used the key to enter the room unannounced (H. 7, 9-10, 42-44). Petitioner was standing between two double beds with a briefcase lying open on the bed when the agents entered (H. 44-45).[4] After announcing that he was a federal Customs agent, Wilson arrested petitioner and another agent immediately searched the briefcase (H. 10-11, 44-45; Tr. 354). The contents of the briefcase, consisting primarily of papers, was seized. When the gun was not found, Wilson searched the remainder of the motel room (H. 48). This search revealed nothing.

Walter Denny Turner testified that he had been employed by petitioner as a pilot to fly marihuana into the

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[3]Walter Turner, the pilot of the Cessna 206, testified that Johnny Hasty was not involved in the scheme (Tr. 134).

[4]Agent Wilson testified that both a briefcase and a flight bag were lying open on the bed directly in front of petitioner (H. 49-50). Another Customs agent also testified that the briefcase was on the bed (Tr. 355). At the suppression hearing petitioner contended that the flight bag alone was lying on the bed and the briefcase was closed and located on a luggage rack on the side of the room (H. 51-53).

country from Mexico (Tr. 34-37, 160, 220-221).[5] On June 29, 1973, he was instructed to make another trip to Mexico and was given approximately $30,000 to be used to purchase marihuana (Tr. 124-125). He flew the Cessna 206 to the same runway in Mexico that he had used on previous trips and exchanged the money for approximately 1,000 pounds of marihuana (Tr. 125-126). On the return trip he was forced to land unexpectedly in Uvalde, Texas, due to engine failure (Tr. 131, 159). After unsuccessfully trying to reach a person he was to call if an emergency arose, Turner called two of his friends who brought his pick-up truck and assisted him in transferring the marihuana to the truck (Tr. 132-133). Shortly thereafter, Turner's friends were apprehended by Customs agents (H. 2-3; Tr. 133). Turner, who had separated from his friends, was arrested at a service station where he stopped after noticing his truck parked there (Tr. 133).

Documentary evidence seized from petitioner's briefcase was introduced to corroborate the testimony of Walter Turner. The majority of the exhibits were invoices for gasoline and services on the Cessna 206 performed throughout the period of time Turner had use of the aircraft (Tr. 272-274, 368). Another set of exhibits contained dates and columns of numbers which corresponded to Turner's testimony concerning the dates of his flights to Mexico, the price paid for the marihuana, and the number of pounds purchased (Tr. 355-361). Each of the remaining documents was introduced to corroborate other aspects of Turner's testimony.

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[5]In return for his cooperation, Turner was promised that he would not be prosecuted for his involvement in this crime.

1. There was probable cause for petitioner's arrest. Probable cause exists when the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to justify the belief that a crime has been committed by a suspect. *Carroll* v. *United States,* 267 U.S. 132, 162. The record shows that Agent Wilson had such knowledge and trustworthy information about petitioner's involvement in the smuggling scheme.

Agent Wilson knew that an aircraft officially registered to petitioner had been used to bring marihuana into the country and that the Bureau of Customs suspected petitioner was engaged in smuggling narcotics. See *United States* v. *Harris,* 403 U.S. 573, 583. Wilson was aware that this suspicion was supported by recent Customs examinations of another of petitioner's planes, which had uncovered marihuana sweepings, and by a report that still another of petitioner's planes had crashed in Mexico with a load of marihuana aboard. In these circumstances, Agent Wilson had probable cause to arrest petitioner. However, petitioner contends that his plane's registration with the Federal Aviation Administration (FAA) could not be used to establish ownership of the aircraft because of 49 U.S.C. 1401(f)[6] (Pet. 4). His reliance on that section is misplaced. The registration was not utilized to establish petitioner's ownership in a legal proceeding; rather, it was merely evidence of a "fact or circumstance" which helped to establish probable cause.

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[6]49 U.S.C. 1401(f) provides in pertinent part:

> * * * Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

Petitioner's further contention that Agent Wilson lacked probable cause because Agent Overstreet had been told that petitioner had sold the plane is likewise without merit. Since his examination of official FAA records did not disclose the alleged sale, Agent Overstreet understandably did not relate this information to Wilson prior to the arrest. The FAA records showed no owner other than petitioner even four and one-half months after the alleged sale. Nevertheless, assuming *arguendo* that a legitimate sale had taken place prior to petitioner's arrest, the official registration of ownership would have supported a reasonable although erroneous belief that petitioner was the owner. It was quite reasonable to believe that petitioner was the owner of the aircraft in light of both the registration and Turner's information that the plane was owned by a wealthy rancher in Mexico, a description Wilson knew fitted petitioner.

2. Petitioner also contends that the agents exceeded the proper scope of a search incident to arrest.

Upon their entry into the motel room, the agents noticed petitioner standing by the bed with a briefcase within his reach. The agents were entitled to search petitioner and that "area from within which he might gain possession of a weapon or destructible evidence." *Chimel* v. *California,* 395 U.S. 752, 763.[7] This search of an area within petitioner's immediate control and search of the person were properly incident to a valid arrest. *United States* v. *Robinson,* 414 U.S. 218. Thus, the evidence seized from the briefcase was properly admitted at trial.

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[7]After a search of petitioner and his briefcase failed to uncover the weapon he was believed to carry, a more thorough search of the room itself was undertaken. This more extensive search produced nothing, and its legality is thus not in issue. Petitioner alleges that all of his belongings in the motel room were seized at this time (Pet. 10-11). The record does not support this contention.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.